IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7957 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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STATE OF GUJARAT

Versus

NARBHERAM GOVIND FULTARIYA

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Appearance:

Ms. Siddhiben Talati, Asstt. G.P. for Petitioner

MR DM THAKKAR for Respondent No. 1

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CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 29/10/1999

ORAL JUDGEMENT

Learned AGP Ms. Talati is appearing for the petitioner and the learned advocate Mr. Thakkar is appearing for the respondent workman. The facts of the present case, in short, are that the respondent workman was appointed with the petitioner from 14.12.1979 to 29.3.1981 on the post of Junior Clerk on the basis of 28 to 29 days of each month. In each month, one or two

days' break was given to the petitioner. The service of the petitioner was terminated on 29th March, 1981 by the department. Said order of termination was challenged by the respondent workman before the labour court by filing reference no. 921 of 1987. Before the labour court, the workman has filed the statement of claim in support of the industrial dispute raised by him. The labour court served the department vide notice Exh. 7 to 9 by Registered Post A.D. and in response to the said notice issued by the labour court, the petitioner department had wrote a letter to the labour court and pointed out that the department has submitted a letter dated 24th August, 1987 before the labour court. The petitioner has not appeared before the labour court inspite of service of three notices from the labour court. Thereafter, vide Exh. 10, the labour court issued a notice of hearing to the petitioner and the AD Slip was received back which is on record at Exh. 11 before the labour court. Inspite of that, none had appeared before the labour court to contest the matter. Thereafter, the labour court has examined the respondent workman vide Exh. 13 and the workman deposed before the labour court that he was engaged and appointed with effect from 14.12.1974 to 29.3.1981 as junior clerk and that his services were terminated by oral order and at the time of termination of his service, no notice in writing was given to him nor any retrenchment compensation in lieu of such notice was offered to him. The respondent workman has produced the letter of appointment vide Exh.14 to 19 before the labour court and has also produced certificate issued by the Executive Engineer, Shri S. M. Patel vide Exh. 20 wherein it was certified that the respondent had continuously worked for the period from 14th December, 1`974 to 29th March, 1981. The respondent further deposed that one workman junior to him Shri S.V.Tank at Morbi was continued in service and, thereafter, he was transferred from Morbi. Said deposition of the respondent workman has gone unchallenged and has not been cross examined by the petitioner since no one had appeared on behalf of the petitioner before the labour court. Not only that but the petitioner has also not led any oral evidence before the labour court nor any documentary evidence was produced before the labour court by the petitioner. Thereafter, the labour court has considered the evidence of the respondent workman and the documents which were produced on record were also considered and after considering the decisions reported in 1985 GLR page 946, 28 GLR page 1146, 1985 GLH page 41, the labour court came to the conclusion that the services of the respondent workman were illegally terminated and the same is in violation of the provisions of section 25F

of the Industrial Disputes Act, 1947 ("the ID Act" for short) and, therefore, the respondent is entitled to the reinstatement with continuity of service with full back wages for the intervening period under its award dated 27th November, 1989. Said award was published on 8.12.1989 by the Section Officer of the Labour and Employment Department. Thereafter, the petitioner had filed Miscellaneous Application No. 220 of 1990 for setting aside the said ex parte award passed by the labour court in the aforesaid reference in which it has been pointed out by the petitioner that on 24th August, 1987, detailed reply was produced by the petitioner and at the time of passing the award, the reply which was produced by the petitioner was not considered by the labour court. It was also pointed out that the office in which the respondent was employed was closed as the activities which were being carried out by the said office had stopped from March 31, 1981 and, therefore, the respondent is not entitled to raise the dispute against the closed establishment. In the said application, the respondent workman had filed reply vide Exh. 5 pointing out inter alia that in support of the miscellaneous application filed by the petitioner, no affidavit was filed by the officer and there was delay in filing of the application and, therefore, the application is required to be rejected.

The labour court, after considering the submissions made from both the sides, has come to the conclusion that though reasonable and sufficiently enough opportunities were given to the petitioner to represent its case before the labour court, no one had appeared for the petitioner and there was no justification for remaining absent in the proceedings before the labour court. Not only that but no sufficient cause has been pointed out or shown for remaining absent before the labour court in the reference proceedings and, therefore, ultimately, the labour court has rejected the said miscellaneous application by its order dated 31st August, 1990.

The petitioner has challenged both the orders namely the order passed in the award and the order passed by the labour court in the said miscellaneous application for setting aside the ex parte award by filing the present petition under Article 226 and 227 of the Constitution of India. This Court, at the time of admitting the petition by issuing rule thereon, has granted the interim relief in terms of paragraph 11(B) subject to the provisions of section 17B of the ID Act.

Today, when the matter was taken up for final hearing, learned AGP Ms. Talati has appeared for the petitioner and has placed on record further affidavit in rejoinder of one Pankaj Joshi, Assistant Collector at Morbi in which it was pointed out that the respondent workman is having the land ad measuring about eight acres and ten gunthas and is having agricultural income and that the last drawn wages of the workman were Rs. 469.30 ps.

Learned AGP Ms. Talati has submitted before this Court that the labour court has erred in passing the ex parte award and in not considering the reply which was filed by the petitioner before it and that the labour court has also erred in rejecting the application for setting aside the ex parte award filed by the petitioner. Mr. Thakkar, the learned advocate appearing for the respondent workman has, on the other hand, pointed out that inspite of the notices issued by the labour Court and duly served on the petitioner, no one has appeared before the labour court and the respondent workman who was out of job since 1981 had adduced evidence before the labour court and on that basis, the award was passed by the labour court. The petitioner has not shown any cause in the miscellaneous application for setting aside the award passed by the labour court. No affidavit in support of such application was filed by anybody on behalf of the petitioner and, therefore, it was submitted by Mr. Thakkar that the labour Court was justified in passing the award and also in rejecting the application for setting aside the award. He has submitted that the the award as also the order rejecting application for setting aside the award, both are based on reasoning and this court should not interfere with the same.

I have considered the submissions made by both the learned advocates. I have also gone through the record and have considered the award as also the order rejecting an application for setting aside the award. It is not in dispute that the respondent workman was appointed on 14.12.1979 to 29.3.1981 and during this period, the respondent was in continuous service, of course, with artificial breaks and, therefore, from the date of termination preceding 12 months, the respondent has, undisputedly, completed 240 days of continuous service within the meaning of section 25B of the ID Act and as such, naturally, the respondent is entitled to the protection of section 25F of the ID Act. It is also not in dispute that at the time of termination of the services of the petitioner, no notice or any notice pay in lieu of such notice has been offered to the respondent

by the petitioner. Therefore, said termination is amounting to retrenchment within the meaning of section 2(oo) of the ID Act. Therefore, the termination order is void ab initio and bad and the same cannot sustain. Ms. Talati, the learned AGP appearing for the petitioner has not been able to dispute this situation before this Court. Now, this Court is required to examine the question as to whether the petitioner would have been able to controvert this situation before the labour court, in light of these undisputed facts, if he would have been given opportunity to produce evidence before the labour court. Before the labour court, the petitioner has also pointed out in the said miscellaneous application that during the pendency of the reference, from the date of termination, the respondent workman was gainfully employed. However, no evidence to that effect has been produced and therefore, the labour court has considered the evidence brought before it and has passed appropriate orders after consideration thereof. The finding of the labour court that the order of termination passed by the petitioner is illegal and contrary to the provisions of section 25F of the ID Act is well founded finding and the same is supported by facts as also the decision of this Court.

After considering the ex parte award as well as the order passed by the labour court in the miscellaneous application, I am of the opinion that the labour court has given elaborate reasons and has also considered the decision of this court reported in 1994 (1) GLR page 579. Therefore, according to my view, the petitioner has not been able to point out any infirmity in the decision of the labour court and the same does not call for any interference in exercise of the powers under Article 226 and/or 227 of the Constitution of India.

However, this Court has noticed that the impugned order of termination was passed on 29th March, 1981 and the respondent workman has raised the industrial dispute on 20.11.1985 against the termination order before the petitioner and the dispute has been referred for adjudication by order dated 10th June, 1987. Thus, there was delay on the part of the respondent workman in raising dispute immediately after the date of termination order. Therefore, according to my view, on account of delay on the part of the workman in not raising the dispute immediately, the workman is not entitled for the back wages for the period from the date of termination of his services till the date of his raising the industrial dispute. Thus, for the period from 29th March, 1981 to 20th November, 1985, the workman is not entitled to any back wages on account of delay on his part in not raising

the industrial dispute immediately after the termination of his services. While passing the impugned award as also an order rejecting the application for setting aside the award, the labour court has not considered this aspect. According to my view, it is the duty of the labour court to take into consideration all such aspects, even in while passing ex parte award in absence of the other side because the indolent cannot be given premium for his indolence. Therefore, according to my view, the labour court has erred in not considering this aspect of the matter and also in awarding back wages qua that period. According to my view, this Court, while exercising the supervisory jurisdiction under Article 227 of the Constitution of India, cannot reappreciate the evidence and also cannot act as an appellate court, according to the decision of the apex Court reported in 1998 (1) GLR 17 and AIR 1998 (Weekly) SC 1840. Therefore, except the back wages part for the period from the date of termination till the date of raising industrial dispute by the workman, the award of the labour court does not call for any interference and to that extent, the impugned award passed by the labour court is required to be modified. Accordingly, I pass the following order.

Petition is partly allowed. The impugned award passed by the labour court shall stand modified in so far as the back wages are concerned. The direction of the labour court to the petitioner to pay back wages to the respondent for the period from the date of termination of his services til the date of his raising industrial dispute is quashed and set aside. Accordingly, the petitioner is directed to reinstate the respondent workman in service with back wages from 20.11.1985 to the date of actual reinstatement. Rule is made absolute to the above extent with no order as to costs. Interim relief granted earlier shall stand vacated.

While admitting this petition, interim relief against the operation of the impugned award was granted subject to the provisions of section 17B of the ID Act. Now, since this Court is confirming the impugned award passed by the labour court qua reinstatement with continuity of service, it would be in the interest of justice to direct the petitioner to reinstate the respondent in service within three months from the date of receipt of the certified copy of this order and also to pay him the back wages from the date of his raising the dispute till the date of his actual reinstatement in service. Accordingly, the petitioner is directed to reinstate the respondent in service on his original post

with all consequential benefits and to pay him back wages from the date of his raising the industrial dispute till the date of his actual reinstatement in service on his original post, within three months from the date of receipt of certified copy of this order.

29.10.1999. (H.K.Rathod,J.)

Vyas